

Draft – 12/26/01

Meeting #7 Minutes - Task Force on Public Works

Yogo Inn – Lewistown, MT November 15-16, 2001

PARTICIPANTS:

State:

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Jim Whaley (A&E Division)
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Private Sector:

Steve L'Heureux (L'Heureux Page Werner)
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AGENDA:

- ?? Recap and status of alternative delivery methods pursuit.
- ?? Impact of Debcon vs. City of Glasgow.
- ?? Contractor performance issues.
- ?? Status of A&E Division revision of A/E contract.
- ?? Discussion of CA services provided by private sector.
- ?? A/E contract retainage, project commissioning, future legislation.

DISCUSSION:

Alternative Delivery Methods -

- ~~///~~ Recap of the last year's actions concerning alternative delivery methods:
 - ~~///~~ The work done by the "sub-task force" that was working with the Montana Contractor's Association was dropped during the session.
 - ~~///~~ There was a draft that would have permitted a very limited use of Design-Build, Design-Negotiate-Build, and/or Construction Manager "At-Risk". This was not accepted by the legislature and the draft never had a sponsor.
 - ~~///~~ A revision of this was attempted to make it more of a "study" bill at the request of a senator but that did not make it past the draft stage either.
- ~~///~~ Most participants seem to prefer some form of "pre-qualification" of contractors as opposed to ADM.
 - ~~///~~ Types of qualifying factors would be: # of people on a job; size of previous jobs; timeliness; bonding capacity; financial capacity of the company; etc.
 - ~~///~~ Two-step process of bidding (qualify to bid and then bid) is preferred by many over the traditional low-bid.
- ~~///~~ A&E is not pursuing any form of ADM and has no plans to do so. Some investigation into pre-qualification may occur if time permits.
- ~~///~~ Debcon v. City of Glasgow:
 - ~~///~~ The MT Supreme Court issued the following as part of it's ruling (#99-542) – "This Court declared that it was settled law that the phrase "lowest responsible bidder" does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is "most likely in regard to skill, ability and integrity to do faithful, conscientious work, and promptly

fulfill the contract according to its letter and spirit." *Koich*, 111 Mont. at 466, 110 P.2d at 965 (citations omitted). *See also State ex rel. Eaves v. Rickards* (1895), 16 Mont. 145, 151-52, 40 P. 210, 212 (in addressing state publishing contract that statute required must go to "lowest responsible bidder," the Court determined that the term "responsible" did not refer to pecuniary ability only and included "judgment, skill, ability, capacity, and integrity;" and, therefore, contract need not go to the lowest bidder who tendered a sufficient bond)."

- ✍ This could result in a significant change from how public works projects are awarded but there would, no doubt, be challenges to this.

Contractor Performance Issues -

- ✍ Bonding company could be made as part of the contract – i.e. timely response, damages, involvement, etc.
- ✍ Typically bonds cover performance and not damages.
- ✍ It is imperative that owners watch for overpayment of their contractors.
- ✍ A meeting of public owners with MCA and bonding companies would be beneficial.
- ✍ Retainage:
 - ✍ There is concern that the current statute level of 5% (if performing by the terms of the contract) may not be sufficient.
 - ✍ Contractors use of securities in lieu of retention results in there being little, if any, leverage concerning the holding of funds.
 - ✍ One of the biggest issues is the completion of projects on time and finishing of punch lists in a timely manner.
- ✍ Liquidated Damages:
 - ✍ These are to be taken from funds held in retention or from the securities.
 - ✍ They must be based upon a good estimate of the damages and cannot be seen as a penalty.
 - ✍ It is important that public owners be equitable across all projects and to enforce the damages.
- ✍ Schedule:
 - ✍ This seems to be the single, largest area of concern.
 - ✍ During design, how the construction schedule is arrived at must be given sufficient consideration.
 - ✍ Is it realistic or arbitrary? What factors are involved?
 - ✍ It is believed that construction schedules, for the most part, are realistic. Winter weather, delivery of equipment, other external factors, and other parameters are considered. However, there are occasional schedules that are often dictated to us and these become unworkable.
 - ✍ It is important to bid things in a more appropriate manner (i.e. January to March) in order to minimize most of the negative scheduling impacts.

A/E Services Contract -

- ✍ A&E is looking at doing a full revision of the services contract.
- ✍ Process should take about a year and A&E will seek input from everyone.
- ✍ DPIC may be a good source of information as an "outside" counsel.
- ✍ Time spent on a contract is viewed as very valuable as it defines roles and expectations.
- ✍ It is imperative that owners define their needs very well in order to avoid confusion, disappointment, and conflicts.
- ✍ A template for planning/study/programming work would be an excellent item for inclusion.

A/E Issues -

~~///~~ Construction Administration Services Fee:

- ~~///~~ The contractor in the low-bid process is a factor in the amount of time spent on a project. The CA effort is intensely tied to how competent a contractor is on the project. Pre-qualifying contractors could go a long way in this area.
- ~~///~~ However, the quality of documents is often the largest factor.
- ~~///~~ Owner relationships with consultants vary across the board and it has an impact on the services received during CA.
- ~~///~~ Owners' expectations of CA services include (but are not limited to):
 - ~~///~~ A/Es will deal promptly and directly with construction problems and issues.
 - ~~///~~ Architects will have their consultants visiting the site during critical stages of construction. Consultant trips may be added to the contract.
 - ~~///~~ Good shop drawing reviews, particularly by M/Es, is very important.
- ~~///~~ Would it be possible to negotiate CA fees after the bid? Problem is that budgets are set prior to this and fees would most likely increase (relative to having them negotiated up-front) regardless of the contractor.
- ~~///~~ A competent, third-party on-site person does definitely help. However, would those funds be better spent on the A/E CA fees? One concern goes back to the quality of documents. If the owner pays more for A/E on-site services, will sufficient time be spent in document production or will it go toward catching things in the field?
- ~~///~~ Retainage:
 - ~~///~~ Consultants want to do away with it. A&E Division agrees as it has little, if any, effect on services.
 - ~~///~~ If it is seen as necessary, owners could hold 10% of the CA services fee rather than having retention all the way from the schematic level.
 - ~~///~~ The greatest impetus for design firms to perform is a shot at the next project, not retainage.

Future Legislation -

- ~~///~~ Raise the direct-select limit from \$10,000 to \$25,000 so that agencies don't have to come to A&E as often.
- ~~///~~ Raise in-house design limit from \$75,000 to \$150,000. University system would really benefit from this. Private sector is concerned that this could have a negative impact on the number of smaller projects done by smaller design firms.
- ~~///~~ Is there a possibility that the Director of Administration would be willing to delegate the authority to make consultant appointments to the administrator (i.e. Tom) level to help speed-up the process?

Commissioning -

- ~~///~~ State/agencies like the third-party commissioning approach due to the fact that few engineers are specialized in it. It also brings in a neutral with no vested interest when problems are discovered.
- ~~///~~ A&E is open to the design team providing this service if they are qualified and can approach it in a more neutral way if issues are uncovered.
- ~~///~~ A&E is beginning to bring the commissioning authority on-board early (i.e. at the programming/schematic design phase) in order to minimize impact to the design process.

Future Direction & Task Items -

- ~~///~~ A&E will be contacting MCA about a meeting to discuss performance and bonding company issues.

- ~~SES~~ A&E will investigate the changes in legislation within the executive branch.
- ~~SES~~ A&E will investigate the possibility of getting authority to make architect/engineer selections.